SAN MIGUEL POWER ASSOCIATION, INC.

IBLA 82-878 Decided March 16, 1983

Appeal from decision of the Colorado State Office, Bureau of Land Management, requiring rental charges for right-of-way C-30188.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Fees -- Rights-of-Way: Federal Land Policy and Management Act of 1976

   While sec. 504(g) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1764(g) (1976), indicates that the Secretary of the Interior may charge less than fair market value for annual right-of-way rental, including no charge, the legislative history of that provision reveals that Congress intended that free use be restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large.

APPEARANCES: Robert R. Wilson, Esq., Cortez, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

San Miguel Power Association, Inc., has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated May 4, 1982, which set a rental charge of $25 for the 5-year period beginning April 22, 1981, and ending April 21, 1986, for the electric power transmission line right-of-way C-30188.

Appellant filed the right-of-way application C-30188 May 27, 1980, under section 501(a)(4) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761(a)(4) (1976), for a right-of-way to accommodate a 69-KV electric transmission tie line, 100 feet long and 50 feet wide, and two circuit breaker sites of 35 square feet in area each, across public lands in the NW 1/4 NE 1/4, sec. 13, T. 46 N., R. 16 W., New Mexico principal meridian, Colorado.

In its statement of reasons, appellant states that it "is a nonprofit distribution cooperative supplying electric energy at retail to almost 6,000 consumers in the southwestern portion of Colorado. It is member owned and is not a subsidiary of a profit making business or enterprise. It is a public utility under the laws of the State of Colorado, Colo. Rev. Stat., 1973, 39-4-101(3)." Appellant argues that regulation 43 CFR 2803.1-2(c)(1) does not provide a basis for exclusion of appellant from the class of holder eligible for exemption from right-of-way fee requirements. Rather, appellant avers it is a nonprofit holder of the type intended to be covered under the provisions of 43 CFR 2803.1-2(c)(2) and that, as a matter of public policy, annual rentals should not be imposed upon appellant. Appellant alleges that the BLM decision is arbitrary, capricious, erroneous, contrary to law and fact, and is inconsistent with public policy. In appellant's view, annual rentals should not be assessed for rights-of-way for the use of public land by appellant in this case or by rural electric cooperatives in general. Appellant requested a hearing.

[1] Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1976), provides in its relevant portion:

> (g) The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way: * * * Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned, or to a holder in connection with the authorized use or occupancy of Federal land for which the United States is already receiving compensation for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest.

The pertinent regulation, 43 CFR 2803.1-2(c), states:

> (c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:
>
> (1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.
>
> (2) When the holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise.
>
> (3) When a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary.

In two recent cases San Miguel Power Association, Inc., 64 IBLA 172 (1982), and Tri-State Generation & Transmission Association, Inc., 63 IBLA 347, 89 I.D. 227 (1982), this Board extensively considered the same issues as

raised by appellant herein. This Board held that free use of rights-of-way is restricted to agencies of the Federal Government and to those situations where the charge is token and the cost of collection unduly large. That interpretation was based on the legislative history of section 504(g) of FLPMA:

> Subsection (f). This subsection provides that no right-of-way shall be issued for less than "fair market value" as determined by the Secretary. The proviso at the end of the subsection qualifies this standard where the application is a State or local government or a nonprofit association. In this case, the right-of-way may be granted for such lesser charge as the Secretary determines to be equitable under the circumstances. However, it is not the intent of this Committee to allow use of national resource land without charge except where the holder is the Federal Government itself or where the charge could be considered token and the cost of collection would be unduly large in relation to the return received. [Emphasis added.]

S. Rep. No. 583, 94 Cong., 1st Sess. 72-73 (1975). As we previously pointed out in San Miguel Power Association, Inc., supra, appellant is not an agency of the Federal Government, and while its rental charge is certainly token, being the minimum allowed by regulation, BLM obviously has determined that the cost of collection is not unduly large. We adhere to our earlier holding that appellant is not entitled to an exemption from the rental fees set by BLM, and that the exclusionary language of 43 CFR 2803.1-2(c)(1) eliminates from consideration for reduced charges for rights-of-way under any category of 43 CFR 2803.1-2(c) cooperatives whose principal source of revenue is customer charges. The BLM decision is not contrary to law or inconsistent with public policy.

Since there is no issue of material fact, appellant's request for a hearing is denied. See John J. Schnabel, 50 IBLA 201 (1980).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge